

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING  
EN BANC**



76-7161

76-7161

In The  
UNITED STATES COURT OF APPEALS  
For the Second Circuit

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P/S

FLM COLLISION PARTS, INC.,

Plaintiff-Appellee-Cross-Appellant,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

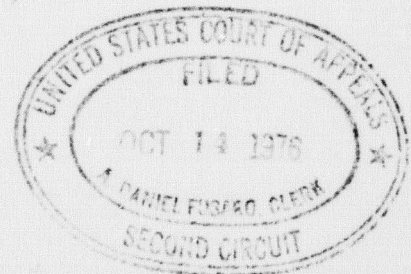
Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court for the  
Southern District of New York (C.D. 73 Civ. 713 (T.P.G.) )

PLAINTIFF-APPELLEE-CROSS-APPELLANT'S PETITION  
FOR REHEARING AND/OR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
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-against- 76-7161 :  
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FORD MOTOR COMPANY and FORD MARKETING CORPORATION, :  
 :  
Defendants-Appellants-Cross-Appellees. :  
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PLAINTIFF-APPELLEE-CROSS-APPELLANT'S PETITION  
FOR REHEARING AND/OR REHEARING EN BANC

Introductory Statement

The plaintiff, FLM Collision Parts, Inc. ("FLM"), is an independent wholesaler of crash parts for Ford automobiles. The defendants, Ford Motor Company and Ford Marketing Corporation ("Ford"), are the sole manufacturers of these parts and sell them only to franchised Ford dealers. In July 1971 Ford implemented a plan whereby it charged its franchised dealers 25 percent more on those crash parts which they resold to FLM than it charged for those very same crash parts if the franchised dealer resold them to independent repair shops.

FLM commenced an action alleging, among other things, a violation of the Robinson-Patman Act, 15 U.S.C. 13(a), and Section 1 of the Sherman Act, 15 U.S.C. 1. After a non-jury trial

before Judge Thomas P. Griesa, the Court found that Ford's pricing policy violated Section 2(a) of the Robinson-Patman Act and dismissed FLM's Sherman Act claims.

Ford appealed the district court's decision that it violated the Robinson-Patman Act and FLM cross-appealed with respect to the district court's dismissal of FLM's Sherman Act claims.

On September 30, 1976, this Court, in a decision totally unsupported by the record and which decision is entirely contrary to the law and in essence makes a nullity of the Robinson-Patman Act in the Second Circuit, reversed the district court's finding that Ford had violated the Robinson-Patman Act and affirmed the district court's finding that Ford had not violated Section 1 of the Sherman Act.

This Court based its September 30, 1976 decision on the proposition that since Ford charged all of its franchised dealers the same price for crash parts which they resold to independent repair shops at a price 25 percent higher than those crash parts which they resold to FLM, there was no price discrimination by Ford. As will be shown, this Court totally ignored the analysis of the Robinson-Patman Act provided by the district court in its decision, 406 F.Supp. 224 (S.D.N.Y. 1975), and instead adopted a superficial analysis of the Robinson-Patman Act, which in essence makes the Robinson-Patman Act a nullity in the Second Circuit.

For this reason, FLM requests that its petition for a rehearing and/or rehearing en banc be granted so that this Court may have an opportunity to reconsider its decision of September 30, 1976 and in light of the importance of the issue that the matter be submitted to the full Court for an en banc determination with respect to whether or not the Robinson-Patman Act should be read in the superficial manner in which it has been construed by this Court in its decision of September 30, 1976 which in essence makes a nullity of the Robinson-Patman Act in the Second Circuit.

THE ROBINSON-PATMAN ACT PROHIBITS  
THE SALE OF GOODS OF THE SAME GRADE  
AND QUALITY TO DIFFERENT PURCHASERS  
AT DIFFERENT PRICES.

Section 2(a) of the Robinson-Patman Act makes it unlawful for a person to directly or indirectly discriminate in price between different purchasers of goods of like grade and quality.

It is undisputed that Ford charges different prices to its franchised dealers, to wit, 25 percent more for the very same crash parts, if those crash parts are resold by its franchised dealers to FLM rather than directly to an independent repair shop. The district court found that this radical price difference constituted a violation of Section 2(a) of the Robinson-Patman Act (406 F.Supp. at 236).

This Court in its decision reversing the district court's finding that Ford had been guilty of price discrimination based its decision upon the fact that Ford allegedly treated all of its franchised dealers equally, offering each dealer the same price offered to any other dealer depending upon whom that franchised dealer resold the parts to (p. 5773). This Court further held that the Robinson-Patman Act does not prohibit a seller from charging different prices to its purchasers depending upon whether or not its purchaser is acting as a retailer or a wholesaler (p. 5773, 5778). The Court in its September 30, 1976 decision further went on to state that Ford was doing no more than providing a well-accepted functional discount to its franchised dealers, the legality of which could not be questioned (p. 5778).

The Court's decision and reasoning is totally contrary to the purpose and intention of the Robinson-Patman Act, unsupported by the record and could not have been reached by any legitimate or accepted interpretation of the Robinson-Patman Act. In fact, the Court's decision makes a nullity of the Robinson-Patman Act in the Second Circuit.

The Robinson-Patman Act prohibits discrimination in the sale of goods of the same grade and quality to different purchasers. There is no provision in the Robinson-Patman Act which permits a seller to charge different prices to its customers depending upon whom they resell to. Although the Robinson-Patman

Act has always accepted legitimate functional discounts as being permitted, the case now before the Court does not deal with a legitimate functional discount. As the district court well recognized in its decision, a functional discount has always been one where a seller charges a buyer higher up on the distributive scale a lower price than is charged to one lower down on the distributive scheme. However, exactly the opposite of a legitimate functional discount is occurring in the case now before the Court (406 F.Supp. at 243). In our case Ford is charging its franchised dealers 25 percent more when they resell to FLM than when they sell to independent service stations.

Without labeling FLM's function, it is clear that FLM is at least as high up on the distributive scale as independent repair shops and that whatever a franchised Ford dealer may be doing when it sells crash parts to FLM, it is certainly acting as a wholesaler of those parts and not as a retailer. At the very least, a franchised dealer should be entitled to the same discount from Ford as when it resells parts to independent repair shops.

The Robinson-Patman Act clearly prohibits the type of pricing scheme which Ford has engaged in and which this Court has sanctioned in its September 30, 1976 decision. The Act does not permit the charging of different prices to different customers depending upon whom they resell to. Any difference in price must

be one that is cost justified and a distinction among purchasers based upon who their customers are would make a mockery of the Act.

The Committee in the House of Representatives when considering the Robinson-Patman Act stated:

"The differential granted a particular customer must be traceable to some difference between him and other particular customers, either in the quantities purchased by them or in the methods by which they are purchased or their delivery taken." 80 Cong.Rec. 9417 (1936)

Similarly, the Federal Trade Commission when asked to render an advisory opinion by a manufacturer regarding a proposed pricing scheme stated:

"The Commission will not approve any standards whereby a wholesaler's eligibility for added discount is contingent upon the imposition of specified restrictions upon his customers by him." 16 CFR 15.333.

Logic and common sense dictate that if a seller is permitted to charge different prices for the same goods to his customers depending upon whom they resell to, the Act would become useless. All a seller would have to do is create an intermediate level of distribution and then charge that distributor one price for goods which were resold to favored customers and another price for the goods which were sold to someone else.

The case of FTC v. Borden Co., 383 U.S. 637 (1966), relied upon by this Court in its decision of September 30, 1976 (p. 5775) for the proposition that Ford's pricing scheme

is not violative of the Robinson-Patman Act, in fact stands for the very contrary proposition. Borden made it clear that a product of the same grade and quality even if sold under both the brand name label and a private label could not be sold for a different price unless both the private label and the brand name product were made equally available to all of Borden's customers. Borden in no manner sanctioned any pricing scheme where the exact same goods were sold to different customers for different prices depending upon whom they resold those goods to.

Although Ford may create its own method of distributing crash parts, it may not through a discriminatory pricing scheme prevent its franchised dealers from selling to independent dealers such as FLM who wish to deal in crash parts.

This Court's determination that Ford did not violate the Robinson-Patman Act because Ford treated all of its dealers equally is a non sequiter and does not change the fact that Ford charged its franchised dealers different prices, i.e., 25 percent more when they resold crash parts to FLM. The Robinson-Patman Act prohibits discrimination in price between different purchasers of goods of the same grade and quality. It does not permit such price discrimination to take place if that price discrimination is applied consistently and even perhaps equally to all of its customers if that price discrimination is not cost justified. What is most egregious about Ford's discriminatory pricing scheme is that it was created for the primary and specific purpose of inhibiting sales to independent dealers such as FLM and to prevent

them from dealing in Ford's crash parts (406 F.Supp. at 244).

This Court's decision which found that Ford had a legitimate reason for its discriminatory pricing scheme is unsupported by the record and totally contrary to the facts found by the court below which cannot be set aside unless they are clearly erroneous.

This Court in attempting to bolster its decision and attempt to provide an explanation made various findings of fact directly contrary to the facts found in the record and the findings of fact made by the district court judge, although the district court's findings were not clearly erroneous and were in fact fully supported by the record.

Among other things, this Court's decision of September 30, 1976 made a finding that some franchised dealers were selling to independent wholesalers which independent wholesalers then resold the goods to another franchised Ford dealer (p. 5771). This is totally and completely contradicted by the record since FLM was admittedly the only independent wholesaler of crash parts in existence at the time that Ford changed its policy so that there would be a 25 percent price discrimination with respect to those dealers who sold to FLM (406 F.Supp. at 234).

The improper sales by independent dealers to franchised Ford dealers of parts does not refer to crash parts which are the subject matter of this case, but rather refer to other automobile parts such as spark plugs which Ford distributes through an entirely different distribution system including both franchised dealers and independent distributors. Any

difficulties Ford has in distributing other automobile parts other than crash parts which are distributed through an entirely different system can not be used as a basis for bolstering this Court's decision which permits Ford to discriminate in the sale of crash parts on sales to FLM. The district court had properly found that Ford's alleged defenses and justifications for its discriminatory pricing policy dealt with other areas of its parts business other than crash parts and with totally different distribution systems (406 F.Supp. 245).

This Court's finding (p. 5779-80) that Ford's revision of its discount plan in 1971 so that franchised dealers were charged 25 percent more for goods which they sold to FLM was simply an attempt to further Ford's intention of providing crash parts to independent repair shops at a reasonable price to improve competition in the auto repair business is totally unsupported by the record and directly contradicted by it.

In the real world no auto repair shop would buy crash parts from FLM if FLM's price were not competitive with the price charged by franchised Ford dealers. No repair shop was forced by FLM to purchase crash parts from it. Obviously FLM was doing something right and offering a competitive price so that independent repair shops chose to deal with FLM rather than franchised Ford dealers. FLM did not seek any special privileges or price discount from Ford. All that FLM was seeking and as the district court properly found based upon the record was to be permitted to compete in the sale of crash parts "without the positive hindrance presented by Ford's price discrimination"

406 F.Supp. at 244.

Similarly, this Court in its decision (p. 5779) took issue with the district court's finding that FLM had not acted improperly in any manner in acting as a conduit for the sale of crash parts between franchised Ford dealers and that FLM's history and past record did not provide any basis for Ford to be concerned that FLM would act improperly in the future (406 F.Supp. at 245). This Court stated that it could not understand the trial judge's conclusion that FLM was not a potential intermediary (p. 5779). The district court's finding that FLM had not acted as a conduit and it could not be assumed that FLM would act improperly in the future was properly supported by the record. In addition, Ford had an absolute right to audit its franchised dealers and stop dealing with those who violated Ford's regulations. Ford did not have a right to avoid the possible inconvenience of auditing its own dealers by violating the Robinson-Patman Act and driving FLM out of business.

This Court in its decision made a finding that it was not unreasonable for Ford to promulgate its discount plan so as to charge 25 percent more for parts sold to FLM since it avoided Ford's problem of possible intermediary sales (p. 5779). In fact, this Court is reading a "rule of reason" into the Robinson-Patman Act, something which has never been done before and something which the Act does not provide for. The Act simply states that the sale of the same goods to different persons at different prices which are not cost justified is a violation of the Act.

In addition, even if a rule of reason were read into the Robinson-Patman Act, the district court fully considered that possibility and stated that under the facts of our case and based upon the record, there was no evidence of any attempt by Ford to solve its alleged problems of controlling cheating by its own dealers by means that do not involve price discrimination (406 F.Supp. at 245). Thus, even if a rule of reason does apply, Ford had an obligation to attempt to solve its problems by some means other than price discrimination, which Ford never attempted. This Court's finding that Ford's actions were reasonable is thus totally unsupported by the record.

It becomes clear that Ford's argument regarding FLM acting as a conduit between franchised Ford dealers as the reason for instituting its discriminatory pricing plan is frivolous and is simply a belated attempt to justify a discriminatory pricing scheme directed at FLM to prevent it from competing in the sale of crash parts when any franchised Ford dealer who wished to defraud Ford could simply use an independent repair shop as a conduit. The parts would be sold by one franchised dealer to an independent repair shop or shops to obtain the benefit of the wholesale incentive and the independent repair shops would then resell the parts to another franchised dealer or resell them to the original franchised dealer. Ford's discriminatory pricing scheme clearly had no purpose other than to prevent independent dealers from engaging in the sale of crash parts. Ford's use of a discriminatory pricing scheme to accomplish this is a violation of Section 2(a) of the Robinson-Patman Act.

FORD VIOLATED SECTION 1 OF THE  
SHERMAN ACT BY MAINTAINING CONTROL  
OVER ITS CRASH PARTS AFTER IT HAD  
PARTED WITH TITLE TO THEM.

In United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967), the Court made it clear that a seller had no right to exercise dominion over his goods after parting with title to them. This Court found that Ford had not violated Section 1 of the Sherman Act because there was no agreement between Ford and its dealers and Ford did not restrict its dealers from selling crash parts to FLM although even this Court was compelled to admit that it was unlikely that Ford's dealers would as a practical matter resell crash parts below their own cost (p. 5784-85).

The record is directly contrary to the findings made by this Court. There was a specific agreement between Ford and each franchised dealer as to the price which the dealer would pay Ford for crash parts depending upon whom the dealer resold the parts to. There was a strict enforcement of that agreement by Ford in that Ford audited its dealers to determine to whom its dealers were selling.

In United States v. General Motors Corp., 384 U.S. 127 (1966), the Court pointed out that a dealer was free to choose his own channels of distribution and could act through middlemen if he so desired. In our case the dealers who were selling to FLM were doing precisely what the Court in General Motors said was proper -- choosing their own method of channeling crash parts to repair shops. Ford had no right to tell its

dealers not to sell to repair shops through the means of FLM if a dealer so desired. To do so was a clear violation of Section 1 of the Sherman Act.

Ford should not be permitted to do indirectly what it cannot do directly. If Ford is not permitted to directly prevent its dealers from selling to FLM, it should not be permitted to do so indirectly by charging its dealers 25 percent more when they sell to FLM since the result is exactly the same. Ford is in essence controlling the persons and means through which its franchised dealers may sell crash parts after title to those crash parts is with the dealer.

If this Court's decision of September 30, 1976 is permitted to stand it will serve as a guideline for a means to avoid Section 1 of the Sherman Act. A seller would no longer have to instruct its purchasers whom to sell to or whom not to sell to. The seller would simply charge its customer 25 percent more if its customer sold to disfavored parties. The Sherman Act can not so easily be avoided. This Court's statement (p. 5784-85) that Ford dealers were free to sell to FLM below costs if they so desired is not a legitimate nor practical interpretation of Section 1 of the Sherman Act. The antitrust laws deal with the real world and practical economics and no business will as a matter of course suffer a loss of 25 percent on each sale. The Supreme Court has instructed us that in dealing with the antitrust laws, they are to be dealt with as they apply in the real world. See Simpson v. Union Oil Co.

of Cal., 377 U.S. 13 (1964).

Ford's discriminatory pricing scheme and agreement with its dealers to prevent its dealers from dealing through independent wholesalers such as FLM is a violation of Section 1 of the Sherman Act. FLM does not contend as this Court indicated (p. 5785) that any functional discount would violate Section 1 of the Sherman Act. What FLM does contend and what is supported by the case law is that where a discount scheme is created and the amount of discount is so great that in practice it serves to control the persons to whom goods may be sold, there is, in fact, a de facto combination in restraint of trade which is a violation of Section 1 of the Sherman Act.

#### CONCLUSION

This Court's decision of September 30, 1976 indicates that the Court was misled by Ford and the veneer which Ford put upon its discriminatory pricing scheme into believing that Ford was in fact not guilty of discriminatory pricing. As has been shown, the gloss placed upon Ford's activities in its briefs to this Court and which this Court was misled into accepting in its decision are totally contradicted by the record and the law. Similarly, the Court's decision indicates that it misunderstood the thrust of FLM's argument with respect to Section 1 of the Sherman Act which was violated by Ford. FLM requests that the Court consider a rehearing of this matter, reading this brief together with the initial briefs submitted by the parties and upon a review issue a decision warranted by the law.

FLM further requests that due to the importance of the issues raised on this appeal with respect to the Robinson-Patman Act and the Sherman Act and the fact that if this Court's decision of September 30, 1976 is not modified, both the Robinson-Patman Act and the Sherman Act will become almost a nullity in the Second Circuit, that en banc consideration be granted to this appeal so that the entire Second Circuit may have an opportunity to review the important issues presented by this appeal.

Respectfully submitted,

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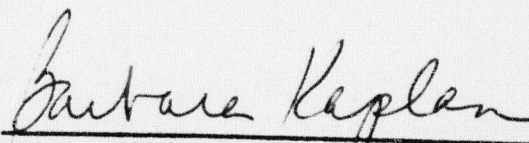
File no:

Title:

STATE OF NEW YORK     )  
                              ) SS:  
COUNTY OF NEW YORK    )

Barbara Kaplan, being duly sworn, deposes and says:  
That (s)he is employed by attorneys for the plaintiff(s)  
herein. That on the 14th day of October, 1976,  
(s)he served the within: Plaintiff-Appellee-Cross-Appellant's  
Petition for Rehearing and/or Rehearing EN BANC  
upon the following; at the address(es) designated by said attorney(s)  
for that purpose by depositing a true copy of same enclosed in a  
postpaid properly addressed wrapper in an official depository  
under the exclusive care and custody of the United States post office  
department within the State of New York:

Sullivan & Cromwell, Esqs.  
48 Wall Street  
New York, New York 10005

  
Barbara Kaplan

Sworn to before me this  
14th day of October, 1976.  
EDNA B. LOKITZ  
Notary Public, State of New York  
No. 31-2394425  
Qualified in New York County  
Commission Expires March 30, 1977

